1973

State of Utah v. Loren Craig Sims : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

vs.

Case No.
12966

LOREN CRAIG SIMS,

Defendant-Appellant.

BRIEF OF APPELLANT

Appeal from Judgment of the District Court of
Salt Lake County, State of Utah
Honorable Gordon R. Hall

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NATURE OF THE CASE

This case was a criminal action brought by the State of Utah against Defendant-Appellant, Loren Craig Sims, charging him with the crime of Rape in violation of Title 76, Chapter 53, Section 15, Utah Code Annotated 1953.

DISPOSITION IN LOWER COURT

In the District Court of the Third Judicial District, Salt Lake County, State of Utah, on the 28th day of October, 1971, the jury found the defendant guilty of Rape. On December 6, 1971, the Defendant was sentenced to imprisonment in the Utah State Prison for the indeterminat term as provided by law for the crime of Rape,said term to be served concurrently with his sentence in Case No. 23425.

RELIEF SOUGHT ON APPEAL

Appellant seeks in the alternative an order of this Court reversing the verdict and judgment rendered at trial and directing the District Court to dismiss the case, or in the alternative an order of this Court reversing the verdict and judgment rendered at trial and remanding the case to the Third District Court, Salt Lake County, State of Utah, for a new trial consistent with the ruling of this Court.

STATEMENT OF FACTS

Trial of the Defendant for the crime of Rape under an infor charging him with violation of Title 76, Chapter 53, Section 15, Utah Code Annotated 1953, commenced on October 20, 1971, at 10:00 a.m. in the District Court of the Third Judicial District, Salt Lake County, Stat of Utah, the Honorable Gordon R. Hall, Judge, sitting with a jury. The State of Utah presente its case consisting of testimony and evidence summarized as follo

1. Pauline Link, the prosecu witness, stated that she met Sims on Friday December 4, 1970; that he picked her up according to prior arrangements, at a party including several people, held at 73 S Street, Salt Lake City, Utah. Miss Link and the Defendan got into his truck, drove a hitch to the University, and then proce to Mr. Sim's automotive shop located at 24 Harvard Avenue, Salt Lake City, Utah. Miss Link said Sims wanted to go there to get some wine. She said that she recalled that the shop was dark when they arrived. She testified that Sims unlocked the door, which had a padlock on it, went in the shop and apparently got the wine, and returned to the truck (T.85-92).

She testified that she and Sims drove toward Park City, during which they had a couple of beers, and as they got part way up the canyon Sims truck malfunctioned and stopped. They turned around and returned to Sim's shop to get another car. She testified that when they approached the shop for the second time the shop was also dark; (T.93) that they went inside and switched cars. She testified that during the time they were in the shop Sims asked her if she "wanted to ball" and she said no. She indicated that Sims made no other advances toward her at this time(T.95).

She then testified that they drove up Millcreek Canyon, turned around and came part way down the canyon at which time they stopped the vehicle and parked near the side of the road. She testified that during this time he gave her a "little kiss", but that he made no other advances toward her (T.96). She testified that they then went to the home of a friend of Sims by the name of Lewis Arnold on Michigan Avenue at about 17th East where they remained for approximately one-half hour, during which time they consumed some additional alcohol. They then drove to a home which Miss Link said was occupied by

her boyfriend whose name is "Cor at approximately 33rd South and 2nd West. After they had determ that her boyfriend was not home Sims said that he wanted to go back to his shop to turn the lig on prior to taking Miss Link hom (T.97).

She testified that she was in the sixth day of her menstrual period and that she had had no sexual intercourse for a period of five or six days. She stated that she was wearing corduroy pants, a shirt, and a matching corduroy coat (T.99).

She testified that as they approached the shop the shop was dark but there was some residual light. She stated that Sims told her that he was afraid to go into the shop alone. He got out of the truck and she said she "belie he took off the lock from the door" (T.100). She said that they entered the shop holding hands, Craig slightly in front of her, after which time she passe him and proceeded slightly ahead of him into the shop. She testifi that as they went toward the back of the shop between two automobile she was aware of being struck in the head with several blows. She says that she recalled that her watch was broken and that her wrist was bruised by the force of the blows, and that she ultima

sank to the floor unconscious (T.102). She testified that when she awoke her head was throbing, there was a considerable amount of blood, and that her pants had been "pulled down". She stated that her pants were unbuttoned and that there were no tears in them. She did however state that two buttons were missing at the time she regained consciousness (T.104). In response to the question as to exactly where her pants were, she stated that they were not off her feet or her legs, but they were "down". She also indicated that at the time of the incident she had had no injuries to her breasts.

She stated that her clothes at the time of the trial were in the same condition as they had been when they were removed from her after the incident, and the clothes were admitted into evidence. The clothes had stains on them which appeared to be blood. States Exhibit No. 10, a pair of womens panties were admitted into evidence. The prosecutrix stated that when she had put them on that evening they were clean. They did bear some dirt and other soil when introduced at the trial (T.107).

Miss Link then testified that Sims helped her into a Corvette automobile, told her they were going to go to the hospital, and drove directly up State Street

toward the L.D.S. Hospital. Dur
the course of that travel they
saw two Highway Patrolmen at abo
Eighth South and State Street.
Sims stopped his vehicle next
to the patrolmen, told them that
his shop had been broken into,
that Miss Link was hurt, and tha
he was taking her to the hospita
They proceeded to the hospital
and Miss Link's injuries were
treated (T.110). She testified
that there was a gash in her sca
and a laceration on the nipple
of one breast. A photograph take
some days later of that wound
was introduced into evidence.
She indicated that her head was
stitched (T.113), and that they
got to the hospital about 2:30
a.m. She testified that Sims
had an injury which she "thought
to be on the left side of his
neck", and that it was red (T.114

She denied at anytime having
given consent to Sims to have
sexual intercourse with her, and
stated that she was unmarried
and that she had never been marri
to the Defendant.

On cross-examination she
testified that she had initially
gone out with Sims because her
number had apparently been given
to Sims by one Jack Brady, whom
she had seen at several parties
(T.115). She stated that she
could not recall any of the perso
who had been at the apartment

on S Street when Sims picked her up except to say that she recalled two persons both of whom were from Price, Utah. She could disclose no local persons who had been at the party (T.117). She stated that she knew that other persons at the party were residents of Salt Lake City but could not state there names or indicate their whereabouts (T.119). She denied any drugs or marajuana were used at the party. She indicated that she and Sims had got to Mr. Arnold's apartment at approximately 12 o'clock midnight and that the other people who subsequently came to that apartment arrived at approximately 12:30 a.m. She denied going to any other place but the apartment on 2nd West and 33rd South for the purpose of finding her boyfriend Cory (T.120). She denied that she and Sims had discussed having sexual intercourse in the canyon. She testified to having had some beer, wine, and a "white alcohol" which Sims had given to her during the course of the evening (T.126). She was unable to testify to the exact route that they had driven while in the truck (T.154). She testified that there were considerable "unrecognizeable objects" laying around the floor of the shop, and she characterized the shop as "messy" (T.157).

2. The State then called J.V. Stevenson, M.D., who testified that he was admitted to the practice

of medicine in the State of Utah specializing in Obstetrics and Gynecology. He testified that he did a pelvic examination on Pauline Link during the early morning hours of December 5, 1971, and found "live sperm in the vagin (T.162), which he testified could maintain its motility for a period from eight to twelve hours commonl and possibly for a period of twent hours. He testified that at the time he saw her, her head had been bandaged.

Dr. Stevenson could not say that the intercourse which had been responsible for the deposit of sperm into the vagina of the prosecutrix was forceable (T.170) and does not recall the presence of menstrual blood or a tampax in the prosecutrix. He stated that had such an item been found in the pelvic area of the prosecutr his notes would have revealed it. He testified that there was no evidence of tearing or abrasions of the external genitalia, and that there was no evidence of eryth swelling or redness of the vaginal tissue (T.172,173). He stated that had the prosecutrix been unconscious at the time of penetrat there would have been a decrease in the amount of lubricating secret in the vagina. He indicated that there was no indicating of a polish or a denudation of the skin indicat a "dry penetration" and that the

prosecutrix had a "perfectly normal pelvis" (T.175). He stated that during the time of the alleged assault, the prosecutrix was between the cessation of menstruation and ovulation.

3. The state then called Claudia Boer, the supervisor of medical records at the L.D.S. Hospital who read a preliminary diagnosis of the injuries to Miss Link, indicating that she had a five inch laceration in the left frontal parietal area of the skull and a further laceration in the occipital periosteum of the skull. She further indicated that the records indicated that Miss Link had a two centimeter laceration on the left breast laterally across the aureola, (T.188). Miss Boer indicated that there was no evidence in the record that any sutures had been taken on the breast, and that the general characterization of a laceration as used in the medical records would be a "scratch" or a "cut" (T.197-8).

4. Miss Link was then recalled stand for further cross-examination. Miss Link stated that the door may have been left unlocked on the second trip back to the shop to change cars, inasmuch as she did not recall Sims locking the door (T.204). She stated that prior to entering the shop on the third occasion, Sims said,"I'm afraid-

you go first" and that she precee
him into the shop as he held her
left hand with his right(T.209).
She stated that she was struck
approximately four to eight times.
She said that when she awoke Sims
was calling to her from another
part of the shop, and that she
was in a different place in the
shop than she had been when struck
Sims told her that apparently
burglars had been in the shop
when they entered and had assaulte
them when caught inside the busine
(T.214). She stated that she
felt that they had been in the
shop approximately thirty to forty
minutes. She stated that at the
time Sims pulled up next to the
Highway Patrolmen on the way to
the hospital, Craig gave them
the address to the shop. She
claims that at the time that
occurred she knew that she had
been raped but did not say anythin
to the officers whatever (T.218).
She did not recall the exact
location of her pants when she
awoke, but recalled that they
were not up around her waist.
She stated that she wasn't sure
that Craig had either hit her
or raped her at the time they
went to the hospital (T.222).
She stated that Sims visited the
hospital, once or twice, brought
a gift, and that no objections
were made by her to his visiting
her (T.224). She stated that
Sims visited her once in her home
but that she had refused to see

him.

She admitted that she had previously had sex with her boyfriend Cory, and denied a statement disclosed in the hospital report wherein she had been overheard to say that she was drunk or on drugs on the evening of this occurrance (T.238).

5. The State then called Richard A. Johnson, an officer with the Salt Lake City Police Department, who testified that he got a call indicating a burglary in progress at approximately 2:20 a.m. December 5, 1970. He approached the premises at 24 Harvard Avenue and noticed that the front door was partially open. He indicated that he found all the doors and windows of the shop secure with the exception of the front door (T.249), and that he found the padlock apparently used to secure the front door in a mud puddle in front of the shop. He stated that he saw the Defendant at the L.D.S. Hospital at approximately 3:00 a.m. and that he appeared to be intoxicated and that there was blood on his person. He indicated that Sims said his arms hurt and that he had been struck, but had not lost consciousness (T.259).

6. Lee Price, also a Salt Lake Police Officer, indicated that he saw Sims at the hospital on the morning of December 5 and that his knuckles were slightly

skinned. He said that when he talked to Miss Link at the hospit she claimed that she had been raped but Sims said that it was "impossible" (T.266). Sims told Officer Price that when they got to the shop the door was open and the light was on, that he had gone in turned off the light, then went back with Miss Link at which time he was struck. Price characterized Sims as excited and drunk at the hospital.

7. The State then called Keith Stauffer, who was at all relevant times an officer of the Salt Lake City Police Force, who stated that he met Sims on December 7, 1970, at the Salt Lake City Hall of Justice. Stauffer indicated that he had a conversation with Sims prior to having advised him of his rights, during which Sims said that when he and Miss Link had returned to the shop the door was standing open and that they went inside the business and that he was struck from behind and knocked down. He was also aware that Miss Link had been knocked down. He said that he had been dazed. He said that he had heard somebody in the shop who he assumed to be burglars

At this time Officer Stauffer advised him of his right to remain silent and the other rights required by Miranda vs. Arizona

(T.277-8). Mr. Stauffer then indicated that his conversation with Sims "basically came to a halt," that Sims reiterated that "she could not have been raped." "She wasn't out; she wasn't unconscious for more than a few minutes; and I was only dazed." At this point the defense objected to any reference to this conversation on the grounds that Sims, after he had been warned of his rights under Miranda vs. Arizona had refused to waive those rights. The defense at that point moved for a mistrial based on the statement of the officer as to conversation which Sims had made after his rights had been read. The objection to the question was over-ruled and the motion for a mistrial was denied (T.279). Stauffer testified that Sims was aggravated at the conversation and reached over and ripped the notes which Stauffer was writing out of his hand and wadded them up. Stauffer said that he recovered the notes.

During the testimony of Detective Stauffer the defense made several objections to the subject-matter of the testimony, including the fact that Stauffer continuinally and persistently volunteered information, refused to answer the questions responsively and appeared to have a sense of duty about getting his version of the story in. The manner of his testimony was highly prejudicial

in the view of the defense and made a fair trial of the issues impossible.

At the conclusion of the prosecu case the defense moved the court to dismiss the case on the following grounds:

1. That the State had not established, by the introduction of reasonable evidence, the corpus delicti of the crime of rape in that there had been no direct evidence whatever that the prosecutr had even engaged in sexual intercours with defendant, let alone been raped.

2. The fact that there was insufficient evidence that if the prosecutrix had been raped the act had been committed by the defendant to justify sending the case to the jury.

Both of said motions were denied and the defense proceeded to present its case which consisted of testimony and evidence as follows.

A. Dale Tenney, a Trooper for the Utah Highway Patrol testified that on the evening in question a red sports car pulled up next to him while he was in the course of ticketing a motorist. In the car were a man and a women; the woman was obviously injured and

bleeding from the head. At the time the car pulled up the window of the sports car was down and the woman was sitting not more than two or three feet from the officer. The female occupant of the car said nothing to him, but the male occupant indicated that his passengar was injured and asked directions to the hospital. There was no mentioned made by either of the occupants of the sports car of a burglary or a rape, nor was any explanation as to the injuries offered.

B. Holly Fife testified that she was a student nurse working at the L.D.S. Hospital, and that she was present when Sims and Miss Link arrived at the hospital. She said that Miss Link did not mention having been raped, and indicated that she did not want Sims to leave the room in which she was being treated. Miss Link did not make any reference to any injury to her breast, or the fact that she had buttons missing from her jeans (T.253-260) She indicated that the attendants at the hospital asked whether or not she had been raped and she responded that she did not remember what had happened (T.264). Mr. Sims stayed in the hospital most of the night, accompanyed Miss Link to x-ray, and was in and out of her presence several times, during which no strain in their relationship appeared.

C. Lois Burch, a nurse at the L.D.S. Hospital indicated that she attended to Miss Link the next day. She indicated that Miss Link was extremely nervous, and that she entered in Miss Link's hospital chart the substance of a conversation which she overheard in which Miss Link stated, "Guess what, I was raped last night" and that Miss Link, during that conversation, said something about "really being on one".

D. Harold Robinson, a Salt Lake City Police Officer, testified that he was at the hospital during the time Sims was there on the evening in question, that Sims had blood on his lower forearms and shirt and appeared to have no wounds on his hands. He stated that Sims wrist was swollen and that he had a large lump on the back section of his head as well as considerable puffiness on one side of his face. He remarked to Sims "You will have a good shiner in the morning", in obvious reference to the wound on his face (T.278-281).

E. Mary Arnold, the mother of Lewis Arnold, testified that on December 5, 1970, Craig Sims and Pauline Link arrived at her home shortly after 12:00 o'clock. She indicated that her son Lewis and several other individuals got home sometime after 1:00,

and that Miss Link and Mr. Sims remained there until approximately 1:30 a.m. on December 5, 1970 (T.293).

She further stated that she saw Craig the next day and that his hand was bandaged and he had a black and blue spot on the side of his face, approximately 2 inches long which looked like a blow (T. 295). She stated that when she had observed Miss Link on the previous evening "You could tell that Miss Link had been drinking or taking pills".

F. Lewis Arnold testified that on the evening of December 5, 1970, he arrived home at approximately 1:10 a.m.; that Miss Link and Mr. Sims were there when he arrived and that they left at approximately 1:30 a.m. He stated that Miss Link appeared "half drunk but not completely drunk" (T. 304-306). He stated that he saw Sims the next day, at which time Sims had a mark from his left eye back to his left ear approximately 1 inch wide, that his hand was bandaged and his head was black and blue.

G. The defense then called Preston Sims who testified that the defendant on the day after the alleged rape had a bruise on his temple, and that his wrist was swollen. He had no scrapes or visible injuries on his hands.

He also stated that he had been at but not in the defendants shop on Harvard Avenue at approximately 11:00 p.m. on December 4, 1970, and that the door to the shop at that time was locked, the lights were off, and defendant's truck was inside with the hood up. He further testified that on the morning after the alleged rape, he found a considerable stain of blood on the steps near the paint room of the defendants shop (T.314-16, 329-30).

H. Mrs. Eugene Link, mother of the prosecutrix, testified that she saw Sims at the hospital during the early morning of December 5. She said that her husband called the police who investigated the injury that her daughter had received. She further stated that Sims visited the hospital in the morning, that he came to their home twice after Pauline Link was released from the hospital and that on the first time he visited the home he brought a gift.

Due to the recalcitrance of this witness the defense requested that she be declared an adverse witness during further questioning. The court refused this motion; whereupon the questioning of this witness was terminated.

I. The defense then called Raymond Brady. The individual who had given Sims Miss Link's telephone number. He stated that he had met Miss Link at a Halloween Party during October of 1971, that they had talked together, smoked some marijuana, and that he had engaged in some reasonably intimate physical contact with the prosecutrix having only met her for a few hours (T.341-342). At this time the District Attorney objected to the line of questioning on the grounds that it was irrelevant and the court sustained the objection. The defense, out of the presence of a jury, argued that in a rape case the character of the prosecutrix was in question, that the defense was entitled to examine into her propensity to engage in sexual intercourse, not only to establish her credibility but to determine the likelihood that the defendant had been required to engage in physical force in order to encourage the prosecutrix to engage in sexual intercourse with him.

The defense proffer was that Mr. Brady's testimony would indicate that Miss Link was of a character that would not require the use of force to get her to submit to sexual intercourse, all of which would go to her credibility in alleging that defendant had raped

her as well as reveal something about his state of mind after having been with her for the length of time that Sims had on the evening of December 4. The court ruled against the defense and refused to permit the introduction of that evidence.

J. Mrs. Charlene Patterson was then called and testified that she had gone out with Sims on several occasions socially and that he had driven her by to check his shop while on the dates. This evidence was introducted to rebut the inference laid by the state that Sims going to the shop had been mere ploy to get Miss Link into a physical circumstance which would be conducive to the act of rape (T.343).

K. Frank Casper, an expert locksmith was called for the purpose of establishing that the kind of lock on Sims shop would be subject to opening very easily by a burglar, and that it could be opened either with a key or with a pry bar without damaging the lock or rendering it inoperable (T. 346-350).

L. The defense then recalled Pauline Link to the stand. She was then carefully interrogated about her actions on the evening of December 4. She did not recall

any of the route on which she and Sims had driven after the party in search for her boyfriend (T.354). She testified that the clothing which had been removed from her at the hospital was not given to the Salt Lake City Police Department until sometime later at her home. She stated that the panties she had been wearing had been clean when she put them on on the evening of December 4. She did not recall seeing the clothes at the hospital. She stated that her clothing had apparently been taken home in a paper sack, but that the first time she saw the clothing worn on the evening in question the items were piled on a table not in any kind of container in the basement of her home (T.367,375-378). She indicated that she thought the clothes were in the same condition at trial as they had been at the hospital but does not recall having seen any blood on her panties when the clothes were removed from her at the hospital (T.382-384).

Her answers to most of these questions were very vague and evasive culminated by her saying " I don't remember any answers to the questions you have been asking" (T.373). Finally, she stated that she had noticed no irritation or itching to any part of her body. This question was put to the prosecutrix due to information provided by Defendant and his brother that the shop of

the defendant was covered with a fiberglass sanding dust, which when it touches the skin causes inflammation and itching.

M. The defense then called the defendant, Loren Craig Sims. He reiterated a good many of the events related by the prosecutrix as they had occurred on the evening of December 4, 1970 and the early morning hours of December 5, 1970, but related the following details and other events which the defense alleges are significant.

First, Sims indicated that when he picked up Miss Link at 73 S Street, Miss Link asked him whether he had any marijuana and when he replied "no" she suggested that they get drunk. He stated that when he picked her up the individuals at the party, including the prosecutrix were rolling and smoking what appeared to be a marijuana cigarette. He stated that Miss Link left the premises at 73 S Street with a marijuana cigarette and that she and the hitchhiker they picked up on the way to the University of Utah were smoking this cigarette in his truck (T.85-87). Sims testified that his reasons for being concerned for the security of his business was the fact that he had had two prior burglaries and that he wanted to be sure the shop was locked up as was his habit (T.90). In

addition to picking up a bottle of wine at his shop, he picked up two six packs of 16oz. beer. He testified that Miss Link had been drinking wine as well as a mixture of beer and everclear of which he had a bottle in his glove compartment. He said that Miss Link requested that he stop several times at service station restrooms (T.93,103). Sims testified that after they had gone to the party at Lewis Arnolds, they left his home at approximately 1:30-1:45 a.m. He indicated that Miss Link asked him to see if he could find her boyfriend and they took a drive from Arnolds house on Michigan Avenue and approximately 17th East to 3rd East and 21st South, and from there to 33rd South and 2nd West. From there they went to Kensington Avenue at approximately 13th East from which point they went to Sim's shop. Sims brother, Preston, testified that he had taken a similar drive after the evening in question and that the elapsed time,obeying the speed limit, was approximately 40 minutes. Sims testified that when they reached his shop they pulled up and the lights were out. The door was ajar and Sims said to Miss Link,"I'll go in, see whats missing, and call the Police". As Sims approached, Miss Link got out of the car and joined him , taking hold of his right hand (T.111). He stated that he did not recall seeing the lock on the door. As they entered the

shop Miss Link was slightly ahead of him, but he left her and proceeded toward the rear of the shop to turn on the light . As he got to the wall and reached for the switch he was struck in the head. He said that everything went black but he doesn't think that he lost consciousness (T.113). Upon regaining his senses he said that he heard crying or whimpering and found Miss Link lying on the floor some distance away near the door to the paint room. He stated that during he was aware of some kind of movement or motion around him, but was unable to see anything (T.116). He stated that Miss Link stated that her head hurt but that he could not tell how badly she was injured. He said that Miss Link asked him " Did they hurt you bad" and that he replied that he was allright. By this time they had walked across the shop to the door and he could see in the outside light that blood was running down her face, whereupon he told her that he would take her to the hospital (T.119-20). He said that the word burglars was not used during the conversation and denied that Miss Link had said she thought Sims had hit her. He stated that as he saw her regaining consciousness she did not do anything with her clothing. He said that they got in the car, pulled on to State Street, and approached the Highway

Patrolmen for directions to the hospital. His testimony about the incident with the patrolman largely corroborated the statements of Dale Tenney, with the addition that questions were asked which indicated that Miss Link could easily have gotten out of the Corvette automobile without difficulty because of the protection afforded by the center console of the automobile from Sims. Sims testified that when they reached the hospital he did what he could to secure help for her and further indicated that Miss Link did not want him to leave her presence (T.125). He testified that his wrist was stiff and that he had some blood on his head. He said that he heard nothing about an allegation of a sexual attack for several days (T.126). At that time, he heard the allegation from Detective Stauffer. He stated that he saw Miss Link at the x-ray division of the hospital and that he went to see her the next morning during visiting hours. He did not talk to Lina but only her mother, who thanked him for being so considerate and staying with Lina the night before (T.128). He again visited the hospital on Sunday evening in the company of several other people, including Miss Link's boyfriend Cory . He said that he had a conversation with her at that time during which she made no mention of any sexual

attack. He said he saw her again at the hospital, gave her a gift, and engaged in a short conversation with her. During that occasion he denied that she had asked him to leave or mentioned anything about a sexual attack (T.130). The next day he went to her home at which time Mrs. Link invited him in. He said that he talked to Pauline Link from the doorway but her mother said that she wasn't dressed and was resting so he left, intending to come back later. He denied that during this visit anything was said about a sexual attack. During the end of the same week he went again to the house and Mrs. Link told him that Pauline was sleeping. This visit was apparently after Detective Stauffer had talked to both Miss Link and Mr. Sims (T.131). He stated that on one of his previous visits he had had a conversation with Miss Link about the visits of the police, in which she said that she wished " she could get them to quit bothering her" . She said she didn't know what they wanted with her and why they kept bothering her (T.132). Sims stated that Miss Link had never told him that her pants had been pulled down during the evening in question (T.153).

At T.156, over defense objection, the District Attorney required

Sims to show his hands to the jury and to clench a fist. Also, on cross-examination, Sims denied having ever told anyone that he had raped Miss Link. He corroborated the testimony of his brother that when the kind of fiberglass dust all over the bottom of the shop comes in contact with the skin, it causes itching and sometimes will cause a rash.

The prosecution on rebuttal called Robert Allan Yockey, who testified that he had been an inmate in the Salt Lake County Jail during a considerable period of time when Sims was incarcerated there awaiting trial. In response to patently leading questions, permitted by the court over objection, he affirmed that Sims had told him that he took Miss Link to his shop, that he knocked her unconscious, and that during the time she was unconscious he raped her; that after he raped her he laid down beside her and pretended that they had been assaulted by burglars.

The special attention of the court is called to the cross-examination of this witness commencing at T.179, during which this witness all but destroyed any claim that he might have that his testimony was credible.He said that Sims told him that he had called the police immediately after he noticed

the girl lying there with the bottom of her clothes off, denied Sims ever said he took her to the hospital and indicated that Sims had said he had set up the door to look like a burglarly, apparently before he and the girl returned to the shop. He indicated that Sims said he had sprained his ankle during the course of the rape and indicated that Sims may have said that the girl got a broken leg during the attack (T.183). He indicated that he had not said anything to anybody about this conversation for a considerable period of time after the conversation had occurred (T.184-185).

At T.189 Yockey testified as to the substance of the conversati he had with Jay Edmonds, most of which was subsequently rebutted by the testimony of Jay Edmonds (T.207).

On surrebuttal the defense called Mark Richmond, also an inmate in the Salt Lake County Jail during the time in which the alleged incriminating statements related by Yockey were supposed to have been made by Sims. Richmond testified that he had been one cell away from Sims during the period in question and that as a habit he never went to sleep before 2:00 o'clock a.m. because he had had a special light installed

in his cell permitting him to read late into the night. He testified that had such a conversation as related by Yockey and Sims occurred, he would have heard it and to his knowledge there had never been anything said by Sims comporting to the substance of the conversation related by Yockey.

Also on surrebuttal, the defense called Gary Phelps, who had been an inmate of the Salt Lake County Jail during the same period of time. He testified that Sims had told him about the affair, indicated that he and Miss Link had been beat up and that he took her to the hospital, and implied that the police were trying to make something up about what happened during the period when Miss Link was knocked out (T.156). He said that Sims had never told him or anybody else in his hearing that he had raped or assaulted Miss Link. He also testified that Yockey had asked him whether "some people can get released from jail if they made a deal if they tell about something another person has done" and that a jailor had said that if you want to tell on somebody he could put him in touch with the people to tell (T.158). He also stated that during this conversation Yockey had mentioned the name of Craig Sims. Phelps further

stated that he was with Yockey every night during the period in question and that during that time Yockey had not had any conversati with Sims of the substance related to the court by Yockey (T.237).

After argument, the jury was charged and retired to deliberate. The jury returned at 6:58 p.m. and found the defendant guilty of the crime of rape as charged in the information.

The defense excepted to of the courts instructions as shall be hereinafter further setforth (T.242).

ARGUMENT

I

THE EVIDENCE UPON WHICH DEFENDANT WAS CONVICTED IS INSUFFICIENT TO SUSTAIN THE VERDICT FOR TWO REASONS:

A. THE EVIDENCE OF THE CORPUS DELICTI OF THE CRIME OF RAPE IS INSUFFICIENT TO ESTABLISH THE FACT OF THE CRIME BEYOND A REASONABLE DOUBT.

Appellant asserts that there are certain evidentiary anomalies both in the testimony of the prosecutrix and others which require recognition of a reasonable doubt that the crime of rape was

committed on the evening of December 4th or the early morning of December 5, 1970 against Pauline Link.

First is a serious problem which arises out of the time elements as they were stated by the witnesses at trial. Lewis Arnold, his mother Mary Arnold, Mrs. Twelves, and Craig Sims, all testified that Sims and Miss Link left the home of Lewis Arnold sometime between 1:25 and 1:35 a.m. on the morning of December 5, 1970. The uncontroverted testimony of Trooper Dale Tenney indicated that Sims flagged him down at approximately 8th South and State Street at 2:05 a.m. on December 5, 1970, a period of at most 40 minutes after the defendant and Miss Link had left the home of Mr. Arnold. Miss Link acknowledged that she and Sims had driven to 33rd South and West Temple in an effort to find Miss Link's boyfriend in that interim. Sims testified that they had stopped at 21st South and 3rd East, then gone to 33rd South and West Temple, and then returned to somewhere in the neighborhood of Kensington Avenue and 13th East also during the same period of time before they returned to his shop. Sims brother testified that at the speed limit, this drive took almost 40 minutes. Miss Link was carefully cross -examined about these other stops, but did not recall them. Attention is called to the vagueness of her testimony

and her inability to even recall the routes they travelled on that evening, all of which can only support the conclusion that her recollection is not nearly so sound as Sims'. The long and short of this is that if there were only 40 minutes available from the time Miss Link and Sims left Mr. Arnold's house and the time they flagged over Trooper Tenney, and they had spent 40 minutes driving around, there would have been no time left during that interim for Sims to accomplish a forceable rape upon Miss Link. Her testimony that she was knocked unconscious for 30 or 40 minutes is obviously untenable in light of this time factor. Even so, it would appear impossible for Sims to have hit Miss Link in the head, removed her trousers and underpants, committed forceable rape on her, put her underpants and trousers on and pulled them partially up, feigned being unconscious himself, and got out of the shop in time to meet the 2:05 deadline testified to by Officer Tenney.

In light of all the foregoing, there is certain a reasonable doubt that during that period of time any act of intercourse was accomplished with the prosecutrix by the defendant.

Further attention is called to the allegations of Mr. Sims regarding the conduct of the prosecutrix at the time he picked her up at the party at 73 S Street. He indicated unequivocally that Miss Link was smoking marijuana and during the course of the evening she became somewhat drunk. Her singular inability to come up with any corroboration whatever for her portion of the story tends to cast substantial doubt about its veracity. Her refusual to disclose the names of any persons at the party is highly significant, particularly in light of the fact that the form of the questions and her answers indicate that she had to know their names. Her inability to recall the time sequence or the routes driven by she and the defendant so as to establish the time sequence more adequately tends to indicate either a drunkeness which exceeds that demonstrated by the record or a refusal to come forward with the whole truth. Her vagueness in answering questions as to the sequence of events at the hospital is significant. At bottom, the prosecutrix came forth with no direct evidence whatever that Sims had committed the crime of rape on her, or that such a crime was ever committed. She simply

permitted, by her refusal to testify and make available evidence of the true facts, a theory of the state based wholly on circumstanti evidence, none of which, by reason of her refusal to disclose the facts, was subject to corroboration, to go to the jury and result in a verdict of guilty. There is no justification permitting such an unsupported theory of guilt, together with a refusal to clarify those portions of the theory which were subject to easy corroboration, to result in the imprisonment of the appellant.

A third inconsistency in the testimony is the assertion of the prosecutrix that she was, on December 5, 1970, in the 6th day of menstruation, and that she was wearing a tampax on that evening. The testimony of Dr. Stevenson was that he did not recall the presence of menstrual blood or a tampax in the prosecutrix (T.170), and that had such been the case he would have made notes of it. He further testified that during a period of unconsciousness there would be a decrease in the amount of vaginal lubrication which would tend to cause a denudation or polishing of the skin upon penetration. No such evidence was found by the doctor. On the contrary he testified that she had a "perfectly normal pelvis" (T.175). This conflict in the testimony raises a question as

to the motive of Miss Link in lying about such inconsequential factors. Defendant alleges that the most logical explanation for the conflict is that Miss Link had in fact engaged in sexual intercourse with somebody other than the defendant within a day or two of the 5th of December 1970, and that she desired to hide that fact from the jury and the spectators in the courtroom, including her parents.

Of further significance is the recalcitrance of the prosecutrix to disclose the name or whereabouts of her boyfriend "Cory". She refused to disclose his identity to the defense prior to trial, and only after she was ordered to do so by the court did she disclose his identity at trial. At this point, it was too late to locate this man, who the defense asserts is the most likely person to corroborate her statement that she had had no intercourse within a period of 24 hours. Her recalcitrance to supply this information can only lead to the conclusion that she was afraid his testimony would contradict hers with the result that the corpus delicti of the crime of rape would remain unproven.

The long and short of this is that the only evidence of rape is the evidence that live sperm was found in the vagina of the prosecutrix on the morning of

December 5, 1970, coupled with her testimony that she had not engaged in sexual intercourse within a period of 24 hours of the time of the pelvic examination. Given the inconsistencies in her testimony and her refusal to disclose facts which would tend to throw light on those inconsistencies a finding that the crime of rape occurred here does not comport with the requirements of due process as set forth in the Fourteenth Amendment to the Constitution of the United States. The finding is wholly circumstantial and obviously ignores the quality of the testimony on which it is based.

B. THE EVIDENCE TENDING TO ESTABLISH THAT DEFENDANT COMMITTED THE CRIME OF RAPE, IF INDEED IT OCCURRED, IS INSUFFICIENT TO SUSTAIN A VERDICT OF GUILTY.

In addition to the facts stated in part A above indicating that the crime itself was not committed, the following further items create a "reasonable doubt" under the instructions of the court, that defendant committed the crime.

1. The actions of the appellant during the course of the evening after the alleged rape occurred do not demonstrate any consciousness of guilt whatever, but indicate

that he had no consciousness whatever that any crime beside an assault by unknown assailants had occurred against he and the prosecutrix.

First is his action immediately after removing the prosecutrix from his shop and putting her in the car. The proposition that a man who had just forceably raped a woman would pull up next to a Highway Patrolman on a public street, with his victim sitting in a car constructed in a manner which would prohibit him from stopping her if she wanted to get out, so that she was immediately adjacent to an Officer of the Law, and ask directions to the hospital is utterly preposterous. The last thing that a rapist would do with his victim is take her to the police. Of further significance is the fact that even though Miss Link had every opportunity to disclose her knowledge of the crime of rape or her suspicions that Sims had assaulted her one way or another to the trooper, and that she failed to do so, indicates that the proposition of a forceable rape had crossed neither of their minds at a point some moments after they left the shop. It is certainly inconceivable that a woman who had just been raped in the manner that Miss Link is alleged to have been raped, would sit idly by, saying nothing, two feet from a

policeman, while still in the company of her assailant. If she had been conscious of being raped, and had any suspicion that Sims had done it, one would suppose her fears about the disposition he would make of her due to that knowledge would compel her to make some effort to get away from him or disclose her suspicions. All of this lends credence to the propositions set forth by the defense that the allegation of rape did not originate in the mind of Miss Link, but was implanted there by the hospital personnel and officers and permitted to grow by her so that she could avoid disclosure that she had committed sexual intercourse with her boyfriend. This proposition is further strengthened by the fact that she said not word one about rape until after the early morning hours of the 5th when Dr. Stevenson approached her and requested permission to perform a pelvic examination upon her. Her actions are consistent with the assertion but that she had had sexual intercourse with her boyfriend within the period immediately prior to her admittance to the hospital, and that she had no concern about that fact until the proposition of rape was raised by hospital personnel. When informed that they wanted her to undergo a pelvic examination

which she knew would disclose that she had had sexual intercourse, she , though not making any statements directly implicating the defendant, merely permitted the assumption that Sims was guilty of the crime to grow. She likely assumed that no case could be made against the defendant by reason of the truth of his allegations about the attack having originated with unknown assailants, which would permit her to not do anything to rebut the train of thought of the police on the assumption that in no event would it cause harm to the defendant. All of the foregoing is also supported by the proposition that she did not remonstrate against Sims presence with her at the hospital, and her lack of hostility towards him on the several subsequent visits which he paid to her both at home and at the hospital. The proposition that a woman who had any consciousness or belief that a man had forceably raped her would permit him to visit with her both in the hospital and in her home is preposterous.

Another factual problem is raised by her refusal to specify what she meant that her pants were "down". If she knew that they were down she must have known how far they were down when she pulled them up. To think that she could state that they were down over her buttocks but not go any further, strikes the writer as ridiculous.

Furthermore, the testimony of Sims and his brother that the shop was covered with a layer of fiberglass dust which causes a severe reaction to the skin would indicate that her pants were not down sufficiently to permit contact with her bare skin to the floor. Otherwise she would have been conscious at least of some itching. No such testimony is found in the record.

Of further significance is the fact that the prosecutrix said that some buttons were off her pants. No buttons were found in the shop or in the vehicle of the defendant. This raises a questions as to where the items, if they were removed from the prosecutrix during the course of an attack, went. The inadequate handling of her clothing, as shall be hereinafter setforth, raises substantial question about the probative value of her testimony that buttons were missing from her trousers.

The defense asserts that Miss Link's defensiveness and refusal to say anything directly incriminating about Sims arises from her guilty knowledge that the whole prosecution arose out of her permitting an inference to arise which was not true. If Sims had struck her six or eight times as she testified, the likelihood that she would

have turned at least to be conscious of the fact that he struck her is so great as to render her refusal to implicate him directly a severe challenge to her credibility. The facts indicate that we simply have here a girl who solved a personal problem by permitting others to weave a false inference from perverted facts which has now resulted in the conviction of the appellant.

Taken as a whole, Sims' recollections as to the events of that evening are entirely more consistent with the corroborated facts than Miss Links', and are certainly so pursuasive as to create, as a matter of law, a reasonable doubt both about the corpus delicti of the offense and Sims implication in it.

Although the courts are generally reticent to overturn the facts found by juries, such action is the duty of courts when it is apparent that the objective standards contained in the instructions to the jury have not been complied with in the fact finding process. See e.g., United States vs. Corso, 439 F.2d 956. In the instant case, the court instructed the jury as follows:

17. To warrant you in convicting the defendant, the evidence must to your minds, exclude every reasonable hypothesis other than that of the guilt of the defendant.

That is to say if after an entire consideration and comparison of all the testimony in the case, you can reasonably explain the facts given in evidence on any reasonable ground other than the guilt of the defendant, you should acquit him. (emphasis added)

In fact, the Arizona Supreme Court has held that failure to give an "alternative reasonable hypothesis" instruction is error. State vs. Valenzuela, 425 P.2d 127. The Florida Supreme Court in Reynolds vs. State, 186 So.2d 315, has said that "where the evidence is wholly circumstantial and does not exclude all reasonable inferences of innocence it is insufficient". The Utah Supreme Court in State vs. Gutheil, 98 U. 205, 98 P. 2d 943, said "A criminal case requires proof of each element of the crime by evidence that convinces one beyond a reasonable doubt of the existence of each such element. In this case, neither the corpus delicti of the crime nor the defendants' guilt thereof were supported by evidence meeting the criteria set forth in the foregoing cases.

To the instant case the following language quoted from U.S. vs. Buflino,, 285 F.2d 408, (CA 2, 1960) is applicable.

> A prosecution framed on such a doubtful basis should never have been initiated or allowed to proceed so far. For in America we still respect the dignity of the individual and even an unsavory character is not to be imprisoned except on definite proof of a specific crime. And nothing in criminal law administration suggests or justifies sharp relaxation of traditional standards.

In this case the court property instructed the jury as follows:

> 20. You are instructed that the charge of rape, is in its nature, a most heinous one, likely to create a strong prejudice against the accused. It is a charge easy to make and hard to disprove

To permit one to be imprisoned when the above quoted instruction is so squarely in point, upon a mishmash of such uncorroborated, confusing, weak, inferential, and contradictory circumstantial evidence as that set forth in this case violates the very fundamentals of the precepts of fairness upon which our judicial system is based, and should therefore not be permitted to go unchecked. To permit this

verdict to stand under the foregoing circumstances constitutes a violation of the fundamentals of due process insured by the Fourteenth Amendment to the Constitution of the United States.

II

THE FAILURE OF THE TRIAL COURT TO GRANT DEFENDANTS MOTION FOR CHANGE OF VENUE WAS REVERSABLE ERROR.

Courts have long recognized an internal conflict in both the language of the Sixth Amendment of the Constitution of the United States and Article 1 Section 12 of the Constitution of the State of Utah, providing that in criminal prosecutions the accused shall have the right to a trial by an impartial jury in the County and District in which the offense is alleged to have been committed, by reason of the fact that sometimes local prejudice existing in that District makes an impartial trial impossible. In recognition of this conflict the legislature of the State of Utah has provided for the removal of criminal actions upon the ground that a fair and impartial trial cannot be held in the County where the action is pending. Section 77-26-1, Utah Code Annotated, 1953. In

light of this problem appellant urges this court to reasses its recent reluctance to overturn District Court refusals to grant defense motion for change of venue and to revert to the position stated by this court through Justice Wade in State v. BeBee, 110 Utah 484,175 P.2d 478:

> ...it certainly would not have been unfair for the court to have granted a change of venue, and we are in opinion that it would have been better if the trial court had granted the change under the circumstances of this case for their were inflammatory news comments... (175 P.2d 481).

This language raises what may be the most pursuasive argument in favor of granting defense motions for change of venue; that is that in a criminal case, the defendant ought to be entitled to the fairest possible trial which can be reasonably given to him, for to do less is to deny him the due process of law to which he is entitled. The Supreme Court has spoken several times on the propriety of granting defense motions for change of venue: Irving v. Dowd, 366 U.S. 717, Shepherd v. Maxwell 384 U.S. 344, Marshall v. U.S. 360 U.S. 310.

Perhaps the best statement of the Supreme Courts' position is found in Irving v. Dowd, supra.

> Here, the buildup of prejudice is clear and convincing. An examination of the then current community pattern of thought as indicated by the popular news media is singularly revealing... A reading of the 46 exhibits which petitioner attached to his motion indicates that a barrage of newspaper headlines, articles, cartoons and pictures was unleashed against him during the six or seven months preceeding his trial. The motion further alleges that the newspapers in which the stories appeared were delivered regularly to approximately 95% of the residences in Gibson County...These stories reveal the details of his background, including a reference to crimes committed when a juvenile....
>
> It cannot be gainsayed that the force of this adverse publicity caused a sustained excitement and fostered a strong prejudice among the people of Gibson County.

An examination of the press notations submitted upon the records of this case together with those about the same defendant in a

case closely related in time and substance to the instant case, which case is presently before this court as Docket No.12244 will reveal the same reflection of public sentiment. Of particular impact are editorial statements made by local papers about not only this defendant but the general system of court procedure which resulted in his being granted a new trial for the crime of murder. When community prejudice is as high as that reflected in this editorial, to permit trial in the jurisdiction where the subject press releases have the greatest currency is to deny defendant the "best trial which can reasonably be given to him", and to violate the due processes of the law as they are guaranteed to him to by Constitution of the United States.

The following are State Court cases containing what appellant asserts to be a more appropriate appellate posture on this question. State v. BeBee, supra; Forsythe v. State, 410 Ohio 2d 104,230 N.E. 2d 611; Juelich v. U.S., 214 F.2d 950 (CA7, 1954); State v. Canada, 48 Iowa 440, 164 N.W. 794; State v. Thompson, 226 Minn. 385,123 N.W. 378; State v. Bruman, 127 Mont.579, 269 P.2d 796; People v. Leadeche; 258 N.W. 115; People v. Fernadez, 89 N.W. 2d 421; Rogers v. State, 236 S.W. 2d 141.

Particular attention is called to the language of Forsythe , supra where in the Supreme Court of Ohio stated:

> Where there is reasonable likelihood that prejudicial news prior to trial will prevent fair trial, and postponing the trial will not remove the threat, the Judge should remove the case to another County not so permeated with publicity (emphasis added).

The fact that the articles published about Sims during 1971, all related him to the offense of felony murder as well as the offense charged in the instant case simply adds weight to his claim that a removal of the trial should have been granted. The temper of the community about these cases was simply not conducive to the conduct of a fair trial. The evidence, inconclusive as it may be, that certain jurors knew about the case prior to their sitting as jurors in the trial further demonstrates the proposition that the public temper about these actions may well have been so great as to vitiate the complete integrity of the jury and permit it to draw inferences from the press which are impermissable under our system of jurisprudence.

By reason of the foregoing appellant asserts that his conviction should be reversed, and if remanded for new trial, that said cause should be held in a County other than Salt Lake County.

III

THE REFUSAL OF THE TRIAL COURT TO GRANT DEFENDANTS MOTION TO DEPOSE THE PROSECUTING WITNESS PRIOR TO TRIAL DENIED DEFENDANT DUE PROCESS OF LAW.

Pivotal to the defense of the instant case was complete exploration of the evidence of the corpus delicti of the crime. After the preliminary hearing the defense, through investigative work, determined that Miss Link had a boyfriend with whom, according to the evidence turned up in investigation, the prosecuting witness may well have regularly engaged in sexual intercourse. At the time of preliminary hearing, as well as at trial, the State's evidence of the fact of the crime of rape depended upon the finding of live sperm inside of the prosecuting witness on the morning of December 5, 1971 coupled with her denial that she had had sexual intercourse within the 24 hour period immediately prior to the pelvic examination.

The court found this evidence

sufficient to send the case to the jury, which returned a verdict of guilty. The difficulty with the whole series of events is that the defense was denied the opportunity to investigate the credibility of the statement of the prosecuting witness that she had not engaged in sexual intercourse within 24 hours prior to the time of her pelvic examination by Dr. Stevenson by obtaining from her the identity of her boyfriend, whom the defense viewed to be the most likely candidate to throw additional light on her statement.

In light of this problem, and in light of two refusals of the prosecuting witness to conduct a rational discussion with defense counsel about anything to do with the case, the defense by proper motion moved the court to order a deposition of the prosecuting witness, in the presence of the County Attorney, so this matter could be more fully explored and so that an opportunity would be had to determine the identity of Miss Link's boyfriend.

This motion, filed on May 18, 1971 was denied, with the result that the identity of the boyfriend of the prosecuting witness was not learned by the defense until the time of trial, at which it was far too late to

locate him in time to obtain the answers to the questions desired to be put to him.

Of further significance is the fact that the prosecuting witness, in declining to discuss the case with defense counsel, indicated that the reason she refused to hold such a discussion was that she had been instructed not to discuss the case with the defense by Keith Stauffer, then an Officer of the Salt Lake City Police Department. The result of this course of events is that the defense was denied access to key evidence which it is believed by the defendant would have rebutted the evidence adduced by the State to establish the corpus delicti of the crime for which appellant was convicted.

There has been an evolution in the law relative to the requirement that prosecuters make available to the defense all evidence known by the prosecuter which is material to any case. The Supreme Court initially held,in a series of decisions represented by Napue vs. Illinois, 360 U.S. 264 3 L.Ed 2nd 1217, 79 S. Ct. 1173, that the knowing use of false testimony by a prosecuter who, after the testimony is known to be false permits it to go uncorrected is a violation of the due process

of the law (1959). This holding was an extention of a rule first enunciated in Mooney vs. Holohan, 294 U.S. 103 in which the Supreme Court reversed for a failure to disclose exculpatory evidence: "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears."

The next significant statement and expansion of this rule is found in Brady vs. Maryland , 373 U.S. 83, 10 L.Ed. 2nd 215, 83 S. Ct. 1194 in which the Supreme Court said:

> We now hold that the supression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.
>
> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly (emphasis added).

This rule has been enunciated by several State Courts, represenative of which is the Supreme Court of Missouri in the case of State

vs. Thompson, 396 S.W. 2d 297 (1965) in which the Missouri Court said:

> "Various courts have held that the suppression of (or failure to disclose) evidence in the possession or control of the prosecution which is favorable to defendant and which might be pursuasive to a jury, constitues such a fundamental unfairness as to invalidate a conviction (emphasis added).

This line of cases is particularly significant in this prosecution because, as the court instructed the jury in Instruction No. 20:

> You are instructed that the charge of rape, is in its nature, a most heinous one, likely to create a strong prejudice against the accused. It is a charge easy to make and hard to disprove. On this account you should bear in mind the difficulty of defending against such a charge and consider most carefully all of the evidence and instructions given in making up your verdict.

The extrodinarily fragmentary and tenuous nature of the circumstantial evidence adduced by the State to prove the corpus delicti of the

crime of rape in this case accents the need to put all relevant evidence before the jury. As stated above, there was no direct evidence that anybody had raped Pauline Link, let alone the defendant, and the only evidence to indicate that proposition was the finding by Dr. Stevenson of live sperm in the vagina of the prosecuting witness on the morning of December 5 together with her denial that she had had sexual intercourse within the 24 hour immediately preceeding that examination. There is no question that the sperm was found, but prior to trial the defense uncovered evidence which would have permitted either corroboratio or contradiction of Miss Link's statement that she had not had intercourse within the 24 hours immediately proceeding the morning of December 5. In light of the difficulty of defending against the charge of rape as expressed by the court in its Instruction No. 20, the placement of any impediment to a full investigation of the factual allegations set forth to substantiate the charge, whether made by the investigating officers, the prosecution, or the court, constitutes such a fundamental unfairness in the administration of justice that it runs afoul of the thrust of the language of the Supreme Court of the United States in Brady vs. Maryland, supra.

In this case there is no allegation of affirmative misconduct by the prosecuting attorneys, but what is alleged is an adoption by them, and a refusal to cooperate in the supression of a statement made by the investigating officer to the prosecuting witness which made it impossible for the defense to investigate the credibility of her key statement in this case. When the court failed to remedy that default, the defendant was denied the very substance of an appropriate defense to this charge which denied him fundamental due process of the law.

More particularly in point on pre-trial supression of testimony is the case of Gregory vs. United States, 369 F.2nd 185 where the court of appeals for the circuit stated:

> The prosecutor's advice to prospective witnesses that they not speak to anyone about the case unless he was present was an improper and unreasonable interference with defendants equal right to interview witnesses.

The court of appeals reversed Gregory's conviction by reason of that interference. Of further significance is the case of Howard vs. The State, 244 N.E.2nd 127

wherein the Supreme Court of Indiana reversed a conviction of murder in the first degree, and on appeal held that the trial court's ruling denying defense motions for discovery constituted reversable error. Prior to trial the defendant had petitioned the court for permission to take depositions of two police officers whose names had been given by the prosecuter as prospective witnesses. Emphasizing that a criminal prosecution is not a game but rather a system designed to discover the truth, the Indiana Court reversed the judgment of conviction because in the opinion of the court the defendant was entitled to examine before trial individuals whom the prosecuter had indicated would be witnesses for the State.

The holdings of those two cases are strong pursuasive authority, particularly given the context and facts of the instant case, that appellants conviction should be reversed by reason of an unwarranted and unfair interference with his right to investigate the facts upon which the State's case rests. To have denied him access to the fundamantal facts of the case constitutes such a denial of due process that it is a patent violation of the rights secured to him

by the Fourteenth Amendment to the Constitution of the United States.

VI

THE INTRODUCTION OF CLOTHING OF THE PROSECUTRIX ALLEGEDLY WORN ON THE EVENING OF THE CRIME WAS REVERSALBE ERROR.

Plaintiff's Exhibits 6-10 were comprised of a pair of white panties, trousers, coat, shirt, and a scarf alleged to have been worn by the prosecutrix on the evening of December 4, 1970, and the morning of December 5, 1970. When introduced at the trial the white panties bore dirt smudges and blood stains, and the outer garments were disheveled, dirty, and dusty. Miss Link testified that as to Exhibit 8 the coat, No. 9 the shirt, No. 10 the scarf, No. 6 the panties, and No. 7 the trousers, they were "clean" when she put them on and not in the same condition when introduced at the trial(T. 105-108). As to the coat and pants the defense levied no objections. As to the shirt, scarf and panties, the defense objected to the admissibility of the evidence on the ground of immaterialily. Though the exact foundation of the allegation of immateriality was not stated, that objection was taken by reason of the fact that with the chain of

evidence established at the time of marking and submission into evidence the prosecution had not established that the change in the clothing had been effected during the course of a crime. The prosecution failed to establish that relationship satisfactorily through almost the whole trial. Finally the defense asked relevant questions with reference to the matter commencing at T. 433 and continuing through T. 439. That colloquy comprised both of direct and cross-examination follows:

BY MR. BARBER:

Q Now with reference, Pauline, to State's Exhibit No. 6, what was -- when was the last time you examined these panties in detail in the area of the crotch prior to getting to the hospital?

A I didn't.

Q You didn't? So, would it be safe to say, then, particularly with reference to these red stains, that it is not necessarily so that those happened after midnight of that --

A Yes, it did happen after.

Q And how do you know that?

A Because I wasn't flowing hard enough that that would happen.

Q But when was the last time you had checked?

A Oh, I don't remember.

Q Might it have been early that morning?

A No.

Q No? But you don't -- you said you didn't recall when you changed, so how do you know it wasn't early in the morning?

A It was probably in the evening when I put them on.

Q It was probably in the evening? Do you recall having done that?

A Yes.

Q When was that?

A In the evening.

Q Well, by "in the evening,"--

A Around five, six, seven.

Q Five, six, seven?

You said that those pants remained in your home for some period between the time you were in the hospital and the time that the officer picked them up, is that correct?

A Yes.

Q Where were they during that period?

A I don't know.

Q Would it be safe to assume from the course -- general course of events in your home that those pants would have been in a laundry area?

A No.

Q No? You would put those in a drawer or something?

A They were in a paper bag.

Q They were in a paper bag? And where did the paper bag come from?

A From the hospital.

Q And how -- how do you know those pants were in that paper bag all that time?

A Well, who is going to take them out?

Q Oh, I really don't know, Miss Link, but let me ask you the questions.

You said that you didn't see them when they were brought back from the hospital, isn't that correct?

A That's right.

Q And the next time you saw them was when Detective Stauffer came by?

A Yes.

Q And do you know -- but you said when you first saw them after they got home, they were in a paper bag?

A Yes.

Q Of course, these other articles of clothing were in the paper bag too, weren't they? (Indicating.)

A No.

Q No? How big was the paper bag?

A What paper bag?

Q The paper bag that the clothes were in?

A All of them?

Q Well, that's what I asked you, were they all in a paper bag?

A I said I didn't even think they were in a bag at all.

Q Where were the clothes when you first saw them?

A They were sitting on a table.

Q This table here? (Indicating.)

A No.

Q Which table?

A A table in my house.

Q Were they in any container at that time?

A I don't remember them being in anything.

Q You don't. Do you know whether they were returned to your home in a container?

A No, I don't know that

either.

Q So do you know whether or not they were in a container from the time that you got them home and the time you first saw them on the table?

A I don't know.

Q They may not have been in a container or they may have been in a container?

A That's right.

Q Do you know which part of the house they were kept in?

A I think I saw them down in the basement.

Q Down in the basement? What portion of the basement? Was it in a recreation, rumpus room or a laundry room or garage, or what?

A It's sort of a T.V. room.

Q A T.V. room?

Were they in a container there?

A I don't remember of them being in one.

Q Ever?

A No.

Q They were just loose?

A Yes.

Q All right. Do you know whether they were ever in any other area of your home during that period?

A I don't know.

Q You don't know. Do you know whether they were delivered to your home in a vehicle?

A In a --

Q In a vehicle.

A Oh, I don't know how they were gotten home.

Q All right. That's the question. So you don't know whether they got to your home in a vehicle, right?

A No, I don't. I assume they were.

Q. You assume that. Now, Miss Link, when you were in the hospital, how long were you in the hospital before you had a bath?

A One day.

Q That would have been the

next day?

A Saturday sometime.

Q During that day, did you recall experiencing any itching or rash of any sort on any part of your body?

A No.

Q And particularly with reference to your buttocks and your thighs in the back, did you notice any itching of any kind there?

A No.

Q Or did you notice any abrasions of any sort on that area of the body?

A No, I don't remember.

Q No pain of any sort?

A I don't remember any.

Q You are not conscious of anything at all with reference to that area that would be out of the ordinary?

A Well, if so, I don't remember.

Q All right. Do you know when you put on this pair

of panties that's here as State's Exhibit 6? (Indicating.)

A I told you that evening, Friday evening, and you just asked me.

Q I must have missed that. I thought I asked you when you checked to determine they weren't stained and you said that.

A That's when I put them on.

Q You put them on at the same time. And I presume they had been freshly laundered prior to that?

A. Yes

Q You don't know what happened after you took them off to the time you saw them at home?

A They were sitting in a paper bag. That's all I know.

Q Just one further brief question. You state that the last time that you had intercourse was approximately a week prior to December 5th, is that correct?

A That's right.

Q Was that with your steady

boyfriend?

A Yes.

Q Did you have intercourse requlary with Cory or --

MR. BANKS: Objection --

THE COURT: Sustained.

MR. BANKS: --Your Honor.

Q And you are absolutely certain that you did not have intercourse within two days of December 5th?

A Within a week.

MR BARBER: No further questions at this time.

RECROSS EXAMINATION

BY MR. BANKS:

Q Let's take these items one at a time. (Indicating.)

This one you saw in the home was where and in what, if anything. (Indicating.)

A In a paper bag.

Q All right. How about your coat?

A I don't remember of seeing

any of the others in a bag.

Q In a bag. So that's all the other clothing that you are referring to. But the pants were in a paper bag, is that correct?

A Right.

Q Now, at the hospital, did you see the blood in the same condition on this coat as it is now? (Indicating.)

A Yes. It was all there. Is that what you mean?

Q Yes. And did you see the blood on it at that time?

A Yes. Yes.

Q And did you see these pants in this condition at the hospital? (Indicating.)

A Yes.

Q And I'll ask you if these items that were turned over to the police, to Officer Stauffer, were substantially in the same condition as at the time you removed them at the hospital?

A Yes.

MR. BANKS: That's all.

RE REDIRECT EXAMINATION

BY MR. BARBER:

Q By "substantially" the same, Miss Link, what do you mean?

A They were the same.

Q They looked about the same?

A Well, they hadn't been touched. I don't know how they could be any different.

Q Well, I'm not asking you that. How close did you examine that pair of --strike that. You removed your clothes in the hospital yourself?

A I don't know. You've asked me that.

Q You don't know? You don't know whether you removed your clothes, but you do know you looked at them closely?

A Yes. I could see the blood on them.

Q Well, what were you doing at the time you looked at

them closely?

A I just looked at them. I couldn't help but see it.

Q While you were --

A While I was taking them off or while they were being taken off.

Q But you don't know which one that was?

A No, I don't.

Q So while you were either taking your clothes off or someone else was taking them off, you looked at them very closely?

A Yes. I could see the blood.

Q You could see some blood? I notice that you do not say that you could see any other kinds of stains on them. Is that because you didn't see any particular other stains on them at that point?

A No, I don't know what you are saying.

Q You say you saw blood stains. Is that about what you saw when you looked at the pants was just the pants

with the blood stains?

A My pants don't have any blood on them. My levis, is that what you are talking about?

Q No. I'm talking about your panties.

A I took them off.

Q You took them off?

A Uh-huh.

Q And you said you saw the bloodstains on them didn't you?

A Oh, they were the same way. They are not --

Q No that's not what I am asking. Did you see the blood stains on them at that time?

A I don't remember.

Q Did you see any other kind of stains of them?

A They were really dirty.

Q They were really dirty? Did you see any stains on them?

A I didn't examine them that

close.

Q You noticed they were dirty, but you are not sure they had the blood stains on them.

A I don't know how else they could have gotten on them.

Q I don't either. But the point is, you saw them, saw that they were dirty, but you are not sure what they were dirty with, is that a fair --

A They were just dirty.

Q Okay. They were dirty. And without knowing whether the blood stains were on them in the hospital, you were able to testify that they were the same then as they are now? (Indicating.)

A Sure.

MR. BARBER: No further questions.

Rule 45 of the Utah Rules of Evidence adopted by the Supreme Court of the State of Utah, effective July 1, 1971 reads as follows:

DISCRETION OF JUDGE TO EXCLUDE ADMISSABLE EVIDENCE

Except as in these rules

otherwise provided, the judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairely and harmfully surprising a party who has not had reasonable opportunity to anticipate that such evidence would be afforded.

A note, found in the published copy of the Utah Rules of Evidence after the foregoing contains the following language:

> This applies to frequently arising situations where the trial may get out of hand by the injection of collateral issues having only slight probative value in which would tend to confuse the jury, and or have illegitimate emotional appeal.... this represents the sort of thing that the judge does everyday in actual practice and which is sanctioned here, in the assurance that the results of rare and harmful abusive discretion will be readily corrected on appeal. It is

a rule of necessity. Its sanction cannot be escaped if we are to have orderly and efficient trial proceedure.

The colloquy of counsel with Miss Link set forth above demonstrates conclusively that the introduction of this evidence was at the same time so prejudicial to the defendant by reason of the condition of the clothing as it appeared at trial, and the failure of the State to establish the probability that it's condition had not been materially changed between the time it was removed from Miss Link at the hospital and the time of trial, that its very introduction denied defendant due process of the law. Significant matters about the clothing which prejudiced the defendant were the fact that the shirt worn by the prosecuting witness was dirty and dusty when introduced at trial, when the witness had not testified that she had ever removed her coat so that the dirty and tattered condition of the clothing would have occurred during the course of the attack upon her on December 5, and the dusty and soiled condition of her panties, which if materially different at trial than they were when removed from her at the hospital, would permit the jury to infer that her outer garments were removed while she was raped. The condition of that clothing was,

with the exception of the obliquely relevant testimony of Dr. Stevenson, the only real evidence corroborating the proposition that Miss Link was undressed and raped in the shop of Craig Sims on the early morning of December 5. Unless her panties had been dirty and dusty, which would be a normal result of her having been attacked sexually on the floor of a shop, that presumption would be in considerable doubt.

With reference to Miss Link's panties, the language at T. 441 is indicative of her lack of sureness about the condition of the clothing at the time she removed them at the hospital. When asked whether they had blood stains on them she said "I don't remember" . When asked whether she saw any other kinds of stains on them she said "They were really dirty". When asked whether she saw any stains she said " I don't examine them that close". Then the following sequence occurred:

> Q You notice they were dirty, but you are not sure that they had blood stains on them.
>
> A I don't know how else could they have gotten on them.
>
> Q I don't know either but the point is you saw them, saw that they were dirty,

but you are not sure what they were dirty with, is that a fair -

A They were just dirty.

This shows an extreme lack of definition in the answers and indicates that she was merely making assumptions about their condition on the morning of December 5 derived from their appearance sometime later when they appeared at trial. When it is taken into account that the clothing was loose in the basement of her home for sometime, that they had been transported in the vehicle very likely with no container about them, that any number of people may have handled them and that they may have been in any number of "dirty" places in the home in the interim, to accept her word as being sufficient to establish that the clothes as they appeared at trial were the same as they were on December 5 is ridiculous.

The fact of it is that the trial judge violated both the spirit and the letter of Rule 45 of the Utah Rules of Evidence when he admitted these items, particularly the panties. There can be no question that this evidence "created substantial danger of undue prejudice...and misleading the jury" by reason

of the high likelihood that its condition materially altered between December 5 of 1970 and October of 1971, when there were no protective measures taken to see that the clothes were not further soiled or their condition otherwise materially altered.

The case law concerning "chain of evidence" is not altogether useful by reason of the fact that so often it turns on particular facts present in only one case. The general rule appears to be that some change in the condition of physical evidence between its seizure and trial is permitted, particularly when the changes do not go to the essence of the items introduced or the particular features thereof which are relevant to the items to be proved by their use. See e.g., Duke vs. State, 58 So.2d 764 (1952), Davidson vs. State, 69 S.2nd 757 and State vs. Cooper, 92 A. 2nd 786 (1952) however, some courts have stated a much more restrictive rule on chain of evidence, requiring the State to explain the custody chronologically from the time of seizure until the time of introduction at trial, and with the result that the failure to establish a 100 percent complete chain of custody has been fatal to the introduction of the evidence. See e.g., McElfresh vs. Commonwealth, 243 S.W.2nd 947 (Supreme Court of Kentucky, 1951).

Although precedents may well recommend the adoption by this court of the last stated posture, such a posture is not necessary to require the exclusion of the evidence in this case. The ambit of Rule 45 of the Utah Rules of Evidence, should be defined by an analysis of the concept of circumstantial evidence. Circumstantial evidence was defined as follows in People v. Kennedy, 32 N.Y. 141:

> Circumstantial evidence consists in reasoning from facts which are known or proved to establish such as are conjectured to exist, but the process is fatally vicious if the circumstances from which we seek to deduce the conclusion depends itself upon conjecture.

See also People v. Jackson, 8 N.Y. 2d 939 255 App. Div. 688. The Supreme Court of California has said: "Circumstantial evidence is an insurance to be drawn from fact proved." People v. Royal, 150 P.2d 812. See also State v. Murdock, 34 S.E. 2d S.E. 2d 69 225 N.C. 224. State v. Butler, 94 N.E. 2d 457, Sniegowski v. Reese, 61 N.E. 2d 272, 36 Ill. App. 255.

In defining the measures which are required to be taken in protecting against the arrival at

unjustified conclusions by inferance from proven fact the Supreme Court of Arizona has said:

> Before a material object may be admitted in evidence it must be shown that there has been no substantial change in conditions since the time in issue. Witt Ice and Gas Company v. Bedway, 23 P.2d 952, 72 Aria. 152.

Perhaps the best statement of the Rule is found in 32 C.J.S. Evidence Section 607 wherein the following language is found:

> In order that an article may be introduced, it must be satisfactorily identified and it must also be shown to the satisfaction of the Court that no such substantial change in the article exhibited has taken place such as to render the evidence misleading but it is not necessary that the article be identically the same as at the time in controversy.

This language dictates the following conclusion based upon hypothetical facts:

> That if the purpose for which an Arrow Shirt is introduced into evidence is to prove that at the time in question an individual was wearing an Arrow Shirt, the

condition of that shirt
is immaterial.

However, where, as here, it is the relative amount of soil and dirt upon clothing which is the most significant aspect thereof toward the proof or disproof of the inference sought to be established by the State, and where that soil and dirt was of a common variety, not unique to any given location, and where those clothes were, according to the testimony of Miss Link, placed uncovered and unprotected for a long period of time in the basement of her home where that kind of common dirt and soil was undoubtedly present, the obvious prejudice is too great to permit its placement before the jury without some reasonable explanation. The witness's vague answers to questions about the condition of the clothing when they were removed from her at the hospital, her inability to throw any light upon the care taken in the custody of the items while they were in her home, and her obvious use of frail logic rather than observation to explain the locus and extent of the stains on the clothing when they were introduced at trial, works a positive and a substantial injustice on the defendant because of the obvious implication that if the clothes were that dirty

when they were at the hospital on December 5, they got dirty during the course of a rape, when if a good portion of that dirt or soil was placed there after that time the relative cleanliness of the clothes at the hospital would work an opposite inference to which the defendant is entitled unless reasonable evidence is adduced to show that there was not such a significant change in that interim.

V

INTRODUCTION OF THE TESTIMONY OF ROBERT YOCKEY WAS REVERABLE ERROR BECAUSE:

A. THE TESTIMONY IS SO INCREDIBLE AND YET SO PREJUDICIAL THAT ITS USE BY THE PROSECUTION EXCEDED PERMISSIBLE PROSECUTORIAL DISCRETION AND DENIED DEFENDANT DUE PROCESS OF THE LAW.

The particular attention of this court is directed to the testimony of Robert Allen Yockey commencing At T. 94 running through T. 129. Appellant asserts that the very content of this testimony is so obviously fabricated that it's falsity and incredulity was, or ought to have been known by the prosecution prior to the trial with the result that its very use tainted the criminal processes of this case to the point that due process of the law was violated.

This is particularly true in this case because of the relative weakness of the evidence that Pauline Link was raped on the morning of December 5 and that the defendant committed that crime. In many cases, there would be a sufficiency of corroborating and direct evidence to establish the defendant's guilt beyond a reasonable doubt which would render the use of such testimony non-prejudicial, but when the evidence is as weak as it is here, the use of such testimony if believed in any degree whatever by the jury, would weight the scales sufficiently on the side of guilt to make it material in the extreme and therefore highly prejudicial.

The Supreme Court of the United States, together with the Federal Courts of Appeal in deciding this issue as presented on Writs of Habeas Corpus by defendants convicted in State Courts, have enunciated the following basic rule:

> The due process of law which is protected from State and Federal infringement by the Fourteenth and Fifth Amendments, respectively, is denied by a conviction of crime following a trial in which perjured testimony on a material point, is knowingly used against the accused, at least where

it appears that the accused suffered prejudice by virtue of the use of such testimony. Annotation: Due Process-Perjured Testimony, 2 L.Ed.2nd 1575.

The cases cited in this annotation all contain statements of that general rule: Mooney vs. Holohan 294 U.S. 103, 79 L.Ed 791, 55 S.Ct.317 U.S. 213, 87 L.Ed 214, 63 S.Ct. 177, White vs. Ragen, 324 U.S. 760, 89 L.Ed. 1348, 65 S.Ct.978, Alcorta vs. Texas, 355 U.S 282 L.Ed. 2nd 9, 78 S. Ct. 103 and Hysler vs. Florida 315 U.S. 411, 86 L. Ed. 932, 62 S.Ct. 688. In all these cases the Supreme Court of the United States reversed convictions based upon it's finding that the foregoing rule was violated.

Of particular significance is Alcorta vs. Texas, supra in which Alcorta was convicted of having killed one Kastiloeja upon provication provided when he caught Kastiloeja kissing his wife in a parked car. At trial Kastiloeja had testified that he was not in love with the petitioners wife, that she was not in love with him and that he had had no dates with her. Subsequently, at a hearing on habeas corpus, he testified that he had had sexual intercourse with the petitioner's wife on five or six occasions

within a relatively brief period before her death and that the prosecutor had known those facts prior to the trial. He stated that the prosecutor had told him that he if were asked questions relating to his having had intercourse with the petitioner's wife he should answer them truthfully, but told him not to volunteer any such information if the questions were not directly put to him. The question was whether or not that testimony would have been material to Alcorta's defense that he killed Kastiloeja in a surge of passion for which he had adequate cause. The Supreme Court reversed, finding that had Kastiloeja not perjured his testimony about the relationship with petitioner's wife the jury likely would have believed his defense of passion, and the failure of the State to affirmatively adduce the nature of that relationship in the testimony of Kastiloeja was a violation of the due process of the laws secured to Alcorta by the Fourteenth Amendment to the Constitution of the United States.

The respondent will no doubt cite two elements of the rule as stated above as being absent in this case in urging the court to disregard this assignment of error; those being the assertion that the appellant has not proven that the testimony of Yockey was

perjured nor that the prosecuting attorney had the requisite knowledge of the perjured nature of the testimony required to bring its use within the proscriptions of the rule stated above. Such a finding was adopted by the Tenth Circuit Court of Appeals in the case of Ryles vs. United States 198 F. 2d 199, in which the Court found that despite a direct conflict in the evidence there was insufficient evidence to establish the fact that the testimony of narcotics agents relevant to the case was perjured. The Court also cited the failure of the petitioner to establish that even if the testimony was perjured, it was knowingly, willfully, and intentionally used. Such holdings are found in Hubbard vs. Jacques, 95 F.supp.894, Price vs. Sloap, 178 F.2d 273, cert denied 339 U.S. 985, 94 L.Ed.1388, 70 S.Ct. 1006, and McGuinn vs. United States, 239 F 2d 449, cert denied 353 U.S. 942, 1 L.Ed. 2d 762, 77 S.Ct. 818. In the later case the court of appeals refused to invalidate the conviction because the evidence of the perjured nature of the testimony adduced by the defendant was related to the "not unusual situation where witnesses recollections differ as to immaterial matters."

Petitioner asserts that the testimony of Robert Yockey in this case did not relate to the "not unusual situation where witnesses

recollections differ as to material matters" but was simply a fabrication of evidence, which the witness may or may not have adequate motive to state, but which related to the very essence of the issues upon which appellant was found guilty.

This entire assignment of error is based on appellants assertion that the quality of the testimony of this witness was so egregious and obviously false, that in his discretion, the District Attorney knew or ought to have known that its use would be sufficiently material and relevant in the trial of this issue to deny the defendant due process of the law, and therefore the use of that testimony is sufficient grounds to invalidate appellant's conviction. Albeit that the general rule is that the mere use of perjured testimony is not sufficient to violate the provisions of the Fourteenth Amendment, but that such a denial occurs only when it appears that such tainted testimony is knowing and intentionally used by the prosecution, the writer finds considerable room to question that statement of the rule because of its obvious over-emphasis on the intent of the prosecutor, which when one places himself in the shoes of the defendant convicted upon perjured testimony,

is of less than no comfort to him. In a free country a defendant ought to be secured freedom from conviction for crime on perjured testimony in any case. Such a fundamental evil should be subject to remedy whether or not the perjured testimony is knowingly used, or whether or not the perjured nature of the testimony itself is discovered before or after trial. Several cases relying on the requirement of knowledge of the prosecutor of the perjured nature of the testimony are found in the annotation cited first above, Tompsett vs. Ohio, 146 F.2d 95, cert denied 324 U.S. 869, 89 L.Ed.1424, 65 S.Ct.916, Kowalak vs. Frisbie, 93 F.Supp 777, In Re Sawyer's Petition, 229 F.2d 10, cert denied 351 U.S. 966, 100 L.Ed.1486, 76 S.Ct. 1025, and Story vs. Burford, 178 F.2d 911, cert denied 338 U.S. 951, 94 L.Ed.587, 70 S.Ct.482. The last case concerned a claim by one convicted in State Court that he had been denied due process by virtue of the fact that the prosecution knowingly used perjured testimony to secure the conviction. His assertion was rejected because the court found that the petitioner himself did not have any evidence showing that the prosecuting authorities or the presiding judge knew that the witnesses were perjuring themselves. A better statement of the rule is found in Jones vs. Kentucky, 97 F.2d 335, in which a Writ of

Habeas Corpus was granted where it appeared that the conviction had been obtained by the use of perjured testimony notwithstanding that it was not shown that the state prosecuting officers knew the testimony to have been false. The Court stated that the fundamental concept of justice which lie at the base of our civil and political institutions must condemn as a travesty a conviction upon perjured testimony if later its falseness is discovered, and the State in such a case is therefore required to afford a correctional judicial process to remedy the alleged wrong if constitutional rights are not to be impaired. Certain cases, in extending the rule stated in Jones, seem to have implied that constructive knowledge of the falsety of testimony used in a trial may be sufficient to violate the rule. In Wilde vs. Oklahoma, 187 F.2d 409 the Tenth Circuit Court of Appeals stated that the use of false testimony will constitute a denial of due process where the prosecuting officers "knew, or... had reason to believe that the testimony offered at trial was false or perjured."

The foregoing is precisely what appellant is asserting here. The testimony of Jay D. Edmonds, Assistant District Attorney,

commencing at Volume VI of the Trial Transcript Page 135, that upon discovering that Yockey had stated that he had heard Sims make statements about his implication in this crime, he took Yockey to the Office of the District Attorney and there inquired of him about his testimony, shows a remarkable lack of probing by the District Attorney's Office to determine the truth or falsity of the proffered testimony. Integrity in the administration of justice ought to impose a duty upon prosecuting officers to make reasonable inquiry, at least a cross-examination of a witness whose testimony appears to be related to a crime, to test that testimony and provide facts upon which to make an independent finding of its probable validity. In this case no such an interrogation occurred, nor was there any effort made to corroborate the testimony with others who may have been involved. That entire duty fell to the defense which was in a far inferior position to come to reasonable conclusions.

Particularly relevant to this issue is the case of Mesarosh vs. United States, 352 U.S. 1, 1L.Ed. 2d 1, 77 S.Ct.1, (1956) in which the Supreme Court of the United States reversed the conviction of defendant for violation of the Smith Act where, on argument at the Supreme

Court the Soliciter General of the United States, though he did not allege that the testimony upon which petitioner had been convicted was necessarily perjurious, simply indicated to the Court that there was a finding that other testimony given at other times and places by the witness Mazzei was inconsistent and uncorrobor The Supreme Court said:

> Either this Court or the District Court should accept the statements of the Soliciter General as indicating the unreliability of this government witness. The question of whether his untruthfulness in these other proceedings constituted perjury or was caused by a psychiatric condition can make no material difference. Whichever explanation might be found to be correct in this regard, Mazzei's credibility has been wholly discredited by the disclosure of the Soliciter General. No other conclusion is possible. The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted and there can be other just result than to accort petitioners a new trial.

The integrity of judicial process in Utah should not be held to be less sacred than those same processes in the Federal Government. Furthermore, the fair administration of the criminal Law should not be left to the prosecutor's decision whether to acknowledge the "taint" on his case or not. A reading of the testimony of Robert Allen Yockey will demonstrate that his testimony was tainted, and that the holding of the Supreme Court that once that is determined there is no alternative but to reverse the conviction for a new trial ought to be adopted by this Court, as a demonstration of the intolerance of this body for tainted judicial processes in the State of Utah.

VI

REFUSAL OF THE TRIAL COURT TO PERMIT THE TESTIMONY OF JACK BRADY CONCERNING THE CHARACTER OF THE PROSECUTRIX WAS REVERSABLE ERROR.

At Page 357 of the Transcript of the Trial, the defense made a proffer in chambers of testimony proposed to be introduced by one Jack Brady. That proffer indicated that Mr. Brady, if permitted to testify, would testify that on or about October 30 he met the complaining witness at a party,

that they talked for a brief period after which they went to his car in which the prosecutrix permitted him to take considerable sexual liberty with her. He would further have testified that he could have engaged in sexual intercourse with her at that time but that he did not for reasons unrelated to her consent or refusal. He would have testified that Miss Link gave him her phone numbe and invited him to call her at any time He would have said that he was certain that had he called her he could have engaged in sexual intercourse with her with no difficulty. He would have further said that he was the one who gave Mr. Sims Miss Link's number and recommended that should he call her he would undoubtedly be able to engage in sexual intercourse with her.

At that time the defense stated that by reason of Miss Link's testimon that Mr. Sims had asked her to have sexual intercourse with him and that she refused, there arose an implicatio that his frustration at that refusal caused him to engage in the stratagem by which he took her to his shop, assaulted her, and had sexual intercou with her while she was unconscious. At the conclusion of the legal argumen about this proffer proper the trial court refused the defense request to introduce this testimony.

Whigmore states the majority rule as follows:

> Ordinarily, the woman's chaste character is not in issue on a charge of rape (though her consent is material), and her acts of unchastity with other men may be admissable to evidence probability of consent on this occasion.

Other than the exception designed to permit evidence of the character of the prosecuting witness as it relates to the issue of consent where that issue is raised by the facts of the case, the Courts have generally held that the reputation of the prosecuting witness for chastity is inadmissable as irrelevant. That holding is the law in the State of Utah as set forth Court in State vs. Scott 55 U. 553, 118 P. 860;

> In view that the defendant denied that he was with the prosecutrix on the night in question and denied that he had had sexual intercourse with her then or at any time, we cannot conceive how such evidence had any relevancy in this case, except perhaps to affect the creditibility of the prosecutrix. It was however, not offered for that purpose, and it is not contended here that it

should have been admitted for that purpose. Where the defendant admits the sexual act, but contends that the prosecutrix consented thereto, and where, as here, she is of lawful age, such evidence is relevant and material upon the question of consent. While it is true that even a prostitute may refuse consent to the sexual act, yet, in contemplation of law, a lewd woman is much more likely to consent to such an act than a chaste woman would be; hence evidence that the prosecutrix was generally reputed to be unchaste is relevant for the purpose just stated. (Cases cited)

The facts of this case, however, introduce a slightly different twist both into the facts and the law upon which the holding in scott is based, by reason of the fact that they present a factual situation in which evidence of the prosecuting witnesses chastity is relevant directly on the issue of her creditibility as well as to permit the defendant to rebut an obvious presumption introduced by the prosecution; to-wit, that it may have been the refusal of the prosecuting witness to consent to have intercourse with the defendant that occasioned the commission of the crime. The appellant testified

at the trial as follows:

Q We drove up Millcreek Canyon we got just past Log Haven, we met some kids backing down in a pickup truck. They said the roads were too slick to get up any further. We drove back down the canyon a ways, and pulled over and stopped for a few minutes.

Q What happened while you were stopped if anything?

A Well, first I got out and went to the restroom -- or something similar. I got back in the truck.

Q In the truck?

A Car, excuse me. I got back in the car and Lina told me that she was really glad that I had called her. She was glad that she had come and she commented that she was balling this other guy regularly and would feel sort of guilty. I really didn't know quite what to say. I told her I understood. She put her arms around me and kissed me. I kissed her back and suggested that we go down the canyon to a friends --down out of the canyon to a friend's

> house. There was usually something going on. It was the weekend so we drove down the canyon and we went to this friends of mine house. (T.103-104).

He said that after he left the party they drove around in search of Miss Link's boyfriend. After failing to find him at any of the locations they checked, the defendant said Miss Link made the following statement.

> We drove up the street and she said she just wanted to drive by and see if it --his car was there, if he wasn't there then should could have a good time and wouldn't have a guilty conscious about it.

Appellant asserts that the logical thrust of this statement of the prosecuting witness was that by reason of the fact that she refused to have intercourse with Sims because of her boyfriend, after they made an unsuccessful search for him she would not mind engaging in sexual intercourse with him. The likelihood that a man would physically assault and molest a woman while she was unconscious who had made clear

to him that she would not object to having intercourse with him is preposterous. It is her credibility both as to her denial that she ever consented to have intercourse with Sims, and the likelihood demonstrated by Brady's testimony that her statement of implying consent to Sims was true that makes Brady's testimony relevant. It can only be assumed that if she would consent to have sexual intercourse with one person, the likelihood is greater that she would consent to have intercourse with another, that is to quote the Utah Supreme Court, "a lewd woman is much more likely to consent to such an act than a chaste woman would be".

Of further significance is the theory put forward by the appellant in argument to the jury that Miss Link had permitted the inference that Sims had assaulted her to arise, not really believing that he could be convicted on the evidence on such a crime, by reason of the fact that she wanted to hide from the public and her parents and fact that she had regularly been having intercourse with her boyfriend. With reference to a similar proposition the Supreme Court of Utah in Scott , supra, stated as follows:

> It was theory of counsel for the defendant however, that the prosecutrix in this case had had intercourse with the individual heretofore referred to; (not the defendant) that she tried, but was unable to see such individual, and that for that reason and in order to shield herself in view of her supposed pregnancy she wrongfully charged the defendant with the offense. No doubt if such were the case the defendant would have the right to prove by her on cross-examination, if he could, that such was the purpose in lodging the complaint against the defendant, and, in order to establish the fact he no doubt would be permitted to prove that she had had intercourse with the individual aforesaid. Under such circumstances it is always proper to show the motives of the prosecuting witness, and if such be the fact, that she is wrongfully accusing the defendant either to shield herself or shield another.

This holding is squarely in point, particularly where it

is seen that the testimony of Brady did not relate to an independent an unrelated act of sexual intercourse with another, but merely the fact that she had consented, after a very brief meeting, to have intercourse with Brady. The damage to the prosecuting witness and the danger of a trial of collateral issues, those being the main foundations for the exclusionary rule, clearly do not apply in this case, with the result that the testimony should have been admitted. The failure of the trial court to do so is reversable error.

CONCLUSION

For the reasons stated the appellant prays that this Court reverse the verdict of the jury and the judgment of conviction upon the offense of rape, and either dismiss the information or direct that the case be remanded for new trial consisted with the opinion of this court.

Respectfully submitted,

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